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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1327

THE BOEING COMPANY
(formerly The Boeing Airplane Company), *et al.*,
Petitioners,

v.

WILLIAM R. VAN GEMERT, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit *en banc,* reported at 590 F.2d 433 (2d Cir. 1978), is set forth in the Appendix hereto at 1a. The opinion of the panel, reported at 573 F.2d 733 (2d Cir. 1978) (*"Van Gemert III"*), is set forth in the Appendix hereto at 27a. The orders of the District Court dated June 30 and September 22, 1977, which were affirmed by the Court of Appeals *en banc,* are set forth in the Appendix hereto at 39a and 43a. The opinions of the Second Circuit on the previous appeals in this action are reported at 553

F.2d 812 (2d Cir. 1977) (*"Van Gemert II"*) set forth in the Appendix hereto at 45a, and 520 F.2d 1373 (2d Cir.), *cert. denied,* 423 U.S. 947 (1975) (*"Van Gemert I"*) set forth in the Appendix hereto at 53a. Also included in the Appendix at 85a is a May 11, 1978 opinion of the District Court denying interim attorneys' fees to the respondents. None of the other opinions of the District Court other than its opinion certifying the action as a class action, 259 F. Supp. 125 (S.D.N.Y. 1966), is reported.

Jurisdiction

The judgment of the Court of Appeals *en banc* was entered on December 21, 1978. The mandate of the Court of Appeals was stayed by order dated February 23, 1979. The petition for writ of certiorari was filed February 26, 1979, and that petition was granted by order entered May 14, 1979. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Statutes Involved

62 Stat. 955, 28 U.S.C. § 1920 provides:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees and exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title.
>
> A bill of costs shall be filed in the case, and, upon allowance, included in the judgment or decree.

68 Stat. 253, 28 U.S.C. § 1923 provides:

> (a) Attorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows:
>
> $20 on trial or final hearing (including a default judgment whether entered by the court or by the clerk) in civil, criminal, or admiralty cases, except that in cases of admiralty and maritime jurisdiction where the libellant recovers less than $50 the proctor's docket fee shall be $10;
>
> $20 in admiralty appeals involving not over $1,000;
>
> $50 in admiralty appeals involving not over $5,000;
>
> $100 in admiralty appeals involving more than $5,000;
>
> $5 on discontinuance of a civil action;
>
> $5 on motion for judgment and other proceedings on recognizances;
>
> $2.50 for each deposition admitted in evidence.
>
> (b) The docket fees of United States attorneys shall be paid to the clerk of court and by him paid into the Treasury.
>
> (c) In admiralty appeals the court may allow as costs for printing the briefs of the successful party not more than:
>
> $25 where the amount involved is not over $1,000;
>
> $50 where the amount involved is not over $5,000;
>
> $75 where the amount involved is over $5,000.

The Rules Enabling Act, 80 Stat. 1323, 28 U.S.C. § 2072 provides:

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United

States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

Question Presented

Does the American Rule on attorneys' fees, as defined in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), permit an award of attorneys' fees in class actions to prevailing class action attorneys which award of fees is taken not only from money actually claimed by their client class members, but also from money that belongs to others, as sanctioned by the Court of Appeals in this case?

Statement of the Case

The issue presently before this Court is the most recent issue to arise in a class action which commenced in 1966 and has resulted in four published opinions of the Court of Appeals for the Second Circuit. To understand the context in which the issue here presented arose and in which the Court of Appeals *en banc* reached such an anomalous result, a brief outline of the procedural history of the litigation is set forth.*

Van Gemert I

Respondents are the representatives of a class of holders of convertible bearer debentures of the petitioner Boeing Company ("Boeing") who, when Boeing called the debentures for redemption pursuant to the contract (the indenture) under which the debentures were sold, failed to convert them into shares of Boeing common stock before the expiration of the conversion privilege.** The class was represented by three separate law firms, each of which now seeks attorneys' fees. After trial on both federal securities law and state law claims, the District Court held that Boeing had met all the notice requirements of the indenture and hence was not liable for the failure of the class to convert the debentures into common stock.

On appeal from the judgment dismissing the complaint, the Court of Appeals in *Van Gemert I* agreed that Boeing

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* A more detailed procedural history may be found in the panel and *en banc* opinions of the Court of Appeals. Appendix at 1a and 27a.

** At the time of the call for redemption, the two shares of Boeing stock into which each $100 in principal amount of debentures was convertible were worth $316.25. The redemption value of the debentures was $103.25. Hence, holders who failed to convert before expiration of the conversion privilege could claim damages of $213 for each $100 in principal amount of debentures. Appendix at 3a, 40a.

had given all notice required by the indenture. That court held, however, that Boeing should have given even more notice because the debentureholders had an implied right to expect more notice than the indenture specified. Appendix at 73a. The Court of Appeals did not hold that Boeing engaged in any fraud or that Boeing had in any way profited as a result of its decision, which had been based on two opinions of counsel, not to provide the additional notice to which the Court of Appeals felt the class had an implied right.* The Court of Appeals simply held that Boeing was liable for the profit that the class could have made if each class member had converted the debentures into common stock and sold the common stock at prevailing market prices. Appendix at 77a.

Van Gemert II

On remand, the District Court fixed the profit that would have been produced by the timely conversion of each debenture and set the method of calculating attorneys' fees. The respondents appealed again, arguing, in relevant part, that class members filing claims for damages should be allowed to divide on a *pro rata* basis the amount which might have been, but was not, claimed by class members, if only for the purpose of paying attorneys' fees. The Court of Appeals in *Van Gemert II* held that class members filing damage claims had no right to unclaimed profits for any purpose, including paying attorneys' fees in whole or in part. The Court reasoned that such an award would constitute a fluid class recovery or one benefiting a "next best class", which was contrary to the Court of Appeals' holding in *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 156 (1974). Appendix at 51a-52a.

* Indeed, the Court of Appeals stated that the only beneficiaries of Boeing's action were "the corporate stockholders [who] benefited by not having their stock watered down by the number of shares necessary to convert [the class's] debentures." Appendix at 77a.

Van Gemert III

On remand from *Van Gemert II*, the District Court entered an order requiring Boeing to deposit in escrow an amount equal to the maximum amount the class could claim in an account at the Chase Manhattan Bank to be "held in escrow" and disbursed under the auspices of a Special Master, as directed by the District Court. Appendix at 41a-42a. The escrow account today contains over $6,500,000. Members of the class have filed claims for damages of approximately $2,000,000.* Since *Van Gemert II*, it has been undisputed that funds deposited pursuant to the order of the District Court which remain unclaimed do not belong either to claiming class members or to the class as an undifferentiated whole. *Van Gemert II*, Appendix at 51a-52a.

The District Court also ordered that even though claiming class members could not directly invade the sums remaining unclaimed in order to pay their attorneys' fees, as *Van Gemert II* had held, these funds could be used to pay the attorneys' fees of the class. Equal shares of the profits lost on each debenture, whether claimed by a class member or not, would be deducted to pay the class attorneys. Appendix at 40a-41a. Boeing appealed from this aspect of the District Court's order as contrary to the decision in *Van Gemert II*.

In *Van Gemert III*, a panel of the Court of Appeals reversed the District Court's order that attorneys' fees could be paid from unclaimed funds. The panel held that under the American Rule on attorneys' fees, as defined by this

* The class attorneys have also requested fees totaling $2,000,000.

Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), attorneys' fees could only be paid from the shares of those class members who actually claimed damages and therefore actually received a benefit from their attorneys' actions. Because the unclaimed money belonged to others for whose benefit the litigation had not been brought, attorneys' fees could not be charged against it. Appendix at 29a, 33a-34a.

The *En Banc* Decision

Respondents filed a petition for rehearing *en banc.* That petition was granted and the issue was considered by the entire Court. The Court of Appeals *en banc,* by a divided vote, affirmed the District Court and held that class action attorneys could be paid fees not only from money actually claimed by their client class members but also from money that did not belong to the class because it was never claimed. Appendix at 3a. Three grounds were stated for the decision.

First, the majority stated that a contrary decision would be inequitable to claiming class members and their lawyers "without any corresponding benefit to absentees." *Id.* Since the unclaimed money, irrespective of ownership, is nevertheless "the spoils of . . . victory," those "spoils" could be used to pay attorneys' fees. *Id.* at 11a n.14. Second, the Court reasoned that a contrary decision would not be "sound policy" because it would "place enormous pressure on attorneys [for a class] to settle." *Id.* at 3a. Third, "long-standing precedent" was said to support the decision. *Id.*

The three dissenting judges stated that the majority had "allowed [its] enthusiasm for class litigation to lead them into approving an award to attorneys that cannot be justified." *Id.* at 17a. The dissenting judges saw nothing in the case which "justifie[d] an award of substantial fees to

lawyers for work purportedly performed on behalf of persons who are not their clients and who, themselves, have not received a single penny as a result of the lawyers' efforts." *Id.*

Summary of Argument

The American Rule generally provides that a prevailing litigant must pay his own attorneys' fees. *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240, 247 (1975). Under the corollary "common benefit" doctrine, the financial burden of a lawsuit can be spread among unnamed parties for whose benefit the suit was brought *and* who were actually enriched by the results obtained. *Trustees* v. *Greenough,* 105 U.S. 527 (1882); *Central Railroad & Banking Co.* v. *Pettus,* 113 U.S. 116 (1885). This common benefit doctrine only applies when the beneficiaries of a lawsuit are "small in number and easily identifiable," when the benefits can be "traced with some accuracy" to the identified beneficiaries, and when there is "reason for confidence that the costs [can] indeed be shifted with some exactitude to those benefiting." *Alyeska Pipeline Service Co.* v. *Wilderness Society, supra,* 421 U.S. at 264 n.39.

There is no dispute that the amount of damages claimed by class members in this action, which now exceeds $2,000,000, constitutes a common benefit from which the class attorneys may be paid fees. A majority of the Court of Appeals *en banc,* however, also held that potential damages that are never claimed constitute a common benefit from which attorneys' fees may be deducted. The *en banc* majority made two fundamental errors in reaching this conclusion.

First, even assuming that some kind of obscure and amorphous "benefit" accrued to the non-claiming class mem-

bers from the unclaimed funds in this case, it was certainly not sufficiently real to satisfy the requirements set forth in *Alyeska* for a grant of attorneys' fees out of those funds. The *en banc* majority created a chimerical "benefit" in non-claiming class members solely for the purpose of assessing attorneys' fees. Thus, the word "benefit" was used but it was stripped of all meaning.

The "long-standing precedent" which the *en banc* majority claimed supported its decision consists of two cases, *Sprague* v. *Ticonic National Bank,* 307 U.S. 161 (1939), and *Trustees* v. *Greenough,* 105 U.S. 527 (1882), neither of which dealt with the issue before this Court and both of which were *explicitly* disavowed by this Court, insofar as they might be construed to address this issue, in *Alyeska Pipeline Service Co.* v. *Wilderness Society, supra,* 421 U.S. at 257-58 & n.30.

The *en banc* majority also avoided the *Alyeska* requirements that such beneficiaries as there are must be identifiable and that the benefits and costs must be shifted to them with some accuracy. Here it is clear that benefits will not be paid to, and costs will not be paid out of those benefits by, non-claiming class members, because no one knows who they are.

The *en banc* majority's second fundamental error lies in even using a common benefit analysis to determine whether attorneys' fees could be paid from potential damages to non-claiming members of a class. *Alyeska* and this Court's other common benefit cases, none of which were class actions, assume that some kind of benefit has been created. Some lower courts have used the common benefit rationale in class action settlement situtations, in which it is also clear that a benefit—the negotiated settlement fund —has been created. In fully litigated class actions, however,

under Rule 23 of the Federal Rules of Civil Procedure and decisions thereunder, a benefit has *not* been established when a defendant is held liable to a class. Instead, consistent with this Court's admonition that (with exceptions set forth in Rule 23) class actions are governed "by the same standards that govern . . . other types of litigation." *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 470 (1978), lower courts have held that a defendant may not be assessed damages in favor of the class as a whole, but rather that each individual class member must claim his own damages before judgment for that amount will be taken in his favor. *See, e.g., Kline* v. *Coldwell, Banker & Co.,* 508 F.2d 226, 238 n.8 (9th Cir. 1974), *cert. denied,* 421 U.S. 963 (1975). Because judgment in favor of an unnamed class member awaits his claim for damages, the benefit out of which attorneys' fees can be taken consists only of the amount claimed by class members. *United States* v. *Imperial Irrigation District,* 595 F.2d 525, 530-31 (9th Cir. 1979).

Finally, the policies underlying class actions support the grant of attorneys' fees to class attorneys only from funds actually claimed by the class. Such a holding will protect class actions which compensate individuals for injuries and injustice felt and suffered while limiting class actions which benefit only the attorneys who bring them. Moreover, such a holding will give class attorneys the incentive to diligently search for, and thus bring a real benefit to, the class members who are supposed to be their clients.

ARGUMENT

POINT I

Any "Benefit" Non-Claiming Class Members May Have From Unclaimed Funds in This Action Is Wholly Ephemeral and Not Enough for Attorneys' Fees to Be Paid From These Funds Under the American Rule.

The *en banc* majority of the Court of Appeals in this case recognized that the American Rule on attorneys' fees and the "common benefit" corollary thereto, as set forth in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), were central to the resolution of the question before the Court. Appendix at 7a. In applying these principles to unclaimed funds, however, the *en banc* majority misapplied this Court's precedents as well as the rationale underlying the common benefit doctrine. The prior decisions of this Court compel the conclusion that, in class actions, attorneys' fees can be collected from the amount which class members have actually claimed, but not from amounts which class members could have, but did not, claim.

A. The American Rule

Since the early days of this Republic, it has been the usual rule that, in the absence of specific legislation to the contrary, each party to a litigation, no matter who wins, pays his own attorney. *See Arcambel* v. *Wiseman,* 3 U.S. (3 Dall.) 306 (1796). The rationale of this rule, which is presently codified as 28 U.S.C. §§ 1920 and 1923, and is set forth at pages 2-3, *supra,* is that the specter of paying attorneys' fees for both sides could deter the assertion of meritorious claims or defenses. As this Court has said: "since litigation is at best uncertain one should

not be penalized for merely defending or prosecuting a lawsuit." *Fleischmann Distilling Corp.* v. *Maier Brewing Co.,* 386 U.S. 714, 718 (1967). This long-honored rule and its rationale were recently and explicitly reaffirmed in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240, 247, 271 (1975). The rule, therefore, is that fees will not be shifted from one party in litigation to another.

While the American Rule precludes the imposition of a winner's attorneys' fees on the loser of a lawsuit, the Rule has recognized that a litigant who gains benefits not only for himself, but also on behalf of others, can force them to contribute to his expenses. The "common fund" or "common benefit" doctrine* allows the financial burden of litigation to be spread among unnamed parties for whose benefit the suit was brought and who were actually enriched by the results obtained. This corollary is based on the venerable common law principle of unjust enrichment. *Trustees* v. *Greenough,* 105 U.S. 527, 532 (1882); *Central Railroad & Banking Co.* v. *Pettus,* 113 U.S. 116, 127 (1885); *see* Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds,* 87 Harv. L. Rev. 1597, 1597-1603 (1974). It requires that "the interests of litigants and [beneficiaries] [be] so closely interlocked that success in the litigation inevitably [brings] evident and measurable gains to the [beneficiaries]." Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds,* 87 Harv. L. Rev. 1597, 1652 (1974) (referring to *Greenough* and *Pettus*). *Accord, American Association of Marriage & Family Counselors, Inc.* v. *Brown,* 593 F.2d 1365, 1369 (D.C. Cir. 1979).

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* The broader term "common benefit" will be used herein. The term "common fund" is often used when the benefit obtained takes the form of a fund. The rationale supporting an award of attorneys' fees is the same under either term.

Trustees v. *Greenough,* for example, involved the protection of a trust fund set up to pay the principal and interest on a bond issue. One of the bondholders recovered assets for the fund which he and 11 other identifiable bondholders equally shared. After the plaintiff's success, payments, some of which had been missed, could again be made on the bonds as scheduled. At the time of this Court's decision, some bondholders had already asked for their missed payments, and others exercised their right under the bond issue to continue getting interest on the entire amount of their principal while retaining the right to have that principal paid at some time in the future. 105 U.S. at 531. But all would eventually be paid exactly what was due on their bonds because the fund set up to make those payments had been saved and an indefeasible right of each bondholder to an equal share of the trust fund had been protected. This Court, therefore, awarded attorney's fees to the plaintiff from the fund, because in this way the cost of the suit would be spread proportionately among all those who concretely benefited from it. The "favorable decree [had given] them all a proportionate advantage," 105 U.S. at 534, and so to force the plaintiff to bear the entire cost of the suit would unjustly enrich the other bondholders.

In *Central Railroad & Banking Co.* v. *Pettus,* one creditor established a lien on certain assets of the debtor, to the benefit of himself and a number of other creditors. This Court, however, did not grant attorneys' fees from the entire pool of assets recovered, because under the common fund doctrine fees could only be collected from creditors who "participated in the benefit" of the action, 113 U.S. at 125. This Court thus held that plaintiff's attorneys' fee could only be taken from the amount of claims actually "filed in the cause." 113 U.S. at 127. In this way both the amount of the benefit and the identity of the beneficiaries was made certain.

B. Clarification of the Rule in the *Alyeska* Case

The *Greenough-Pettus* rationale for and application of the common fund doctrine was reaffirmed and clarified in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975). Plaintiffs in *Alyeska* argued, as does the *en banc* majority here, that a public "benefit" that does not accrue to anyone in particular, but rather benefits society in general, such as the enforcement of beneficial environmental legislation, is enough to shift the burden of attorneys' fees from the winners to the losers and other nonbeneficiaries of litigation. This evasion of the American Rule, which was sometimes referred to as a separate "private-attorney-general rationale," 421 U.S. at 274 (Marshall, *J.,* dissenting), and sometimes as a "generous construction [of] the common-benefit exception," *id.* at 275, was based on expansive dicta in *Sprague* v. *Ticonic National Bank,* 307 U.S. 161 (1939),* and had been adopted in a number of lower court cases, *see* 421 U.S. at 270 n.46. *See also* Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds,* 87 Harv. L. Rev. 1597, 1609-10 (1974).

In *Alyeska,* this Court rejected the expansive use to which *Sprague* had been put. It was recognized that:

> "Sprague . . . . might be read as suggesting that the Court in *Greenough* said that a federal court could tax [attorneys' fees] against the losing party . . . . But any such suggestion is without support either in the opinion in *Greenough,* which is limited to a common-fund rationale, or in [any federal] statute."

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* The argument that *Sprague* should be read broadly to allow attorneys' fees to be charged to those not enriched by the litigation was strenuously urged to this Court in *Alyeska. See* Brief for Respondents at 3, 4, 36, 37, 38, 72, 81, 88-89; Brief of the Lawyers' Committee for Civil Rights Under Law *Amicus Curiae* at 5, 9, 10, 11.

421 U.S. at 258 n.30. Thus, this Court limited *Sprague* to its holding, which is perfectly consistent with prior common benefit cases, that because the plaintiff had established the indefeasible right of 14 other identifiable trust funds as well as her own to certain assets of a bank, she could obtain attorneys' fees from those assets. This Court in *Sprague* was not faced, as it is in the instant case, with the claim that attorneys' fees should be taken in the name of unidentified individuals who got no tangible benefit from the litigation.

This Court in *Alyeska* concluded that the "expanded version of the common-fund approach to the awarding of attorneys' fees" proposed by the plaintiffs was "ill-suit[ed]" to the rationale and precedents of this corollary to the American Rule. 421 U.S. at 264 n.39. This Court then set forth the unifying characteristics of cases that do fall within the common benefit doctrine: first, the classes of beneficiary should be "small in number and easily identifiable"; second, the benefits should be able to be "traced with some accuracy"; and third, there should be "reason for confidence that costs [can] indeed be shifted with some exactitude to those benefiting." 421 U.S. at 264 n.39.

C. Application of the *Alyeska* Criteria to This Case

The *en banc* majority of the Court of Appeals in this case used *Sprague* and *Greenough* to expand the common benefit doctrine in exactly the way that this Court forbade in *Alyeska*. While here the unidentifiable "beneficiaries" are non-claiming class members rather than the general public, the *Alyeska* rationale applies *a fortiori*, because the benefits which non-claiming class members gain from money they never see are far more illusory than the public's benefit from the *Alyeska* litigation. Application of the *Alyeska* criteria to the facts of this case demonstrates that whatever

benefit may derive from unclaimed funds is insufficient to meet those standards.

First, *Alyeska* requires that the recipients of a benefit be "easily identifiable."* The reason for this requirement has recently been succinctly stated by the Ninth Circuit:

> "Ready identifiability is required to ensure clear, concrete evidence that the feeseeker's efforts produced actual benefits to others, and that fees are assessed only against beneficiaries—those who would be unjustly enriched by not sharing in the cost of producing the benefit—and not against persons whose positions are not substantially bettered because of the victorious lawsuit."

United States v. *Imperial Irrigation District*, 595 F.2d 525, 530 (9th Cir. 1979). If the "identity of persons benefited" cannot be ascertained because, for example, "no records have been maintained" that reveal such information, this first requirement of *Alyeska* cannot be satisfied. *Burroughs* v. *Board of Trustees*, 542 F.2d 1128, 1132 (9th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977).

In the instant case, the "benefit" in dispute is the amount of potential damages that is *never* claimed by class members. These funds indisputably do not belong to claiming class members or to the class as a whole. *Van Gemert II*, Appendix at 51a-52a. The *en banc* majority therefore held that it was the non-claiming class members who "benefited" from unclaimed funds. These non-claiming class members, however, are not identifiable as *Alyeska* requires. Class members in this case can be identified only if they submit claims, because the type of debentures that they bought—

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* For purposes of Fed. R. Civ. P. 23, this Court held in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) that class members were identifiable if their "names and addresses may be ascertained."

bearer debentures—has no indication of ownership. Thus, records identifying non-claiming class members are and always have been non-existent. The Court of Appeals' statement in its *en banc* opinion that the identification requirement of *Alyeska* is satisfied because each debenture "bears an explicit number" is meaningless because these numbers are not linked to the names of any debentureholders.

The second requirement of *Alyeska* is that it must be possible for the benefits to be "traced with some accuracy." The *en banc* majority purports to satisfy this requirement by stating that it requires only "elementary arithmetic" to distribute the benefits among the explicitly numbered debentures, but again this explanation begs the question. No one knows where the debentures of non-claiming class members are or who owns them, and it is only with such knowledge that benefits can be traced to a beneficiary.

Finally, *Alyeska* requires "reason for confidence that the costs [can] indeed be shifted with some exactitude to those benefiting." 421 U.S. at 265 n.39. This requirement is the purpose for the first two requirements, for only if one knows who the beneficiaries are and by how much each is benefiting, can one spread the costs of the suit among them "with some exactitude." In the instant case, such exactitude does exist as to claiming class members and the claimed funds that they benefit from. As to non-claiming class members, however, not only is there a lack of "confidence" that the costs of this suit will be shifted to them in proportion to their "benefit" from the unclaimed funds at issue, but there is an utter certainty that such a matching of cost and benefit will not take place under the *en banc* majority's rationale, which allocates these costs *pro rata* to claimed and unclaimed funds alike. At the very least it is clear that the benefit to claiming class members, which

consists of money in their pockets, is of a different order of magnitude from the "benefit" to non-claiming class members, which consists of an "interest" in unclaimed funds that is never realized and that vanishes after attorneys' fees are calculated. *See American Association of Marriage & Family Counselors, Inc.* v. *Brown,* 593 F.2d 1365, 1369 (D.C. Cir. 1979). Only if plaintiff's attorneys' fees are taken solely from funds claimed by class members can the three *Alyeska* criteria be satisfied in this case.

POINT II

There Can Be No Benefit to Non-Claiming Class Members From This Action, and Hence No Payment of Attorneys' Fees Under the American Rule Out of Funds That Might Have Been Claimed by Them, Because No Judgment Against Boeing for Their Damages Exists in the Absence of a Claim.

It has been seen that the *Greenough-Pettus* rationale for the common benefit doctrine, as reaffirmed in *Alyeska,* forbids the grant of attorneys' fees from unclaimed funds in this case. These cases proceeded on the implicit assumption that *some* benefit was created and divided among beneficiaries. The concern of those courts was whether the benefit was tangible enough to justify an award of attorneys' fees. An alternate ground for this Court's decision, however, is that *no* benefit has been created from unclaimed funds in this action. This ground arises from the nature of a fully litigated class action. In such actions, unlike the more numerous settlement situations,*

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* In a settlement context, different considerations apply because the parties may agree to the ultimate disposition of the settlement fund, subject to court approval. *See, e.g., Beecher* v. *Able,* 575 F.2d 1010, 1016 n.3 (2nd Cir. 1978).

each class member must claim his own damages before judgment for that amount will be taken in his favor. Hence, the common benefit produced by the class attorneys, from which they may be awarded fees under the American Rule, consists only of the amount claimed by class members.

A. Class Actions Can Only Compensate Individual Injuries

The limited purpose of a civil action for damages is to compensate an individual who has been injured to the extent of his injury. *See Illinois Central Railroad Co.* v. *Crail,* 281 U.S. 57, 63 (1930); *United States Steel Products Co.* v. *Adams (The Steel Trader),* 275 U.S. 388, 391 (1928); C. McCormick, *Handbook on the Law of Damages* § 137 (1935).* This is equally true of class actions brought under Rule 23 of the Federal Rules of Civil Procedure. *See* Advisory Committee Note to Rule 23, 39 F.R.D. 69, 98-107 (1966) (all examples involve compensation to individual class members).

Even if the framers of Rule 23 had wanted it to have a more expansive mandate, they could not have given class actions any scope beyond that of the underlying substantive cause of action because Rule 23 was enacted under the purely procedural authority of the Rules Enabling Act, 28 U.S.C. § 2072, which provides that no rule promulgated thereunder shall alter any substantive right. *See Sears, Roebuck & Co.* v. *Mackey,* 351 U.S. 427, 433 n.5 (1956); *United States* v. *Sherwood,* 312 U.S. 584, 589-90 (1941).

* A request for punitive damages, or for damages under a particular statute with an expressly punitive purpose, may serve other ends, but no such complications are involved in this case. Damage actions cannot be justified on the theory that plaintiff is benefiting the common weal as a "private attorney general" after *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975). *See, e.g., Calnetics Corp.* v. *Volkswagen of America, Inc.,* 532 F.2d 674, 694-95 (9th Cir.), *cert. denied,* 429 U.S. 940 (1976).

What Rule 23 can and does do is to "achieve economies of time, effort and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Advisory Committee Note to Rule 23, 39 F.R.D. 69, 102-03 (1966). Outside the special procedural rules which allow such actions to proceed, class actions are governed "by the same standards that govern . . . other types of litigation." *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 470 (1978).

In *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974), for example, plaintiffs argued that this Court should adopt various special procedures not sanctioned by either Rule 23 or due process because of the special nature of class actions. This Court refused. Instead, it was held that individual notice of a class action must be sent to all class members who could be identified through reasonable effort and that the cost of this notice could not be shifted to a defendant through use of a preliminary hearing. In so holding, this Court adopted the Advisory Committee's Note to Rule 23, which describes such notice as "not merely discretionary" but rather "designed to fulfill requirements of due process to which the class action procedure is of course subject." 39 F.R.D. at 107, *quoted in Eisen* v. *Carlisle & Jacquelin, supra,* 417 U.S. at 173. This Court recognized that "substantial prejudice" to defendant could result if "the traditional rules and procedures applicable to civil trials" were abandoned. 417 U.S. at 178.

Eisen is only illustrative. In fact, this Court has consistently held that class action parties and their attorneys have no special status. Apart from the terms of Rule 23, they are bound by the same requirements as are other parties to other civil suits. Class members, for example, may not aggregate their claims to satisfy a jurisdictional

amount requirement, *Snyder* v. *Harris,* 394 U.S. 332 (1969), and any class member whose individual claim does not reach this jurisdictional amount must be dismissed from the class, *Zahn* v. *International Paper Co.,* 414 U.S. 291 (1973). The notice that *Eisen* requires to be given to class members must normally be borne by the class, *Oppenheimer Fund, Inc.* v. *Sanders,* 437 U.S. 340 (1978). Moreover, the assertion of class action status does not eliminate traditional doctrines of appealability. *Gardner* v. *Westinghouse Broadcasting Co.,* 437 U.S. 478 (1978); *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463 (1978).

Thus, while certain procedural requirements of civil actions are changed by Rule 23, this Court has repeatedly held that the substantive requisites of sustaining a claim against another party in litigation remain unchanged. One of these requisites is that the fact of individual injury must be shown before recovery. In the absence of this requirement, class action defendants would be faced with the abstract statistical claims of anonymous crowds, and not with the specific human losses that are supposed to set our system of justice in motion. *See In re Hotel Telephone Charges,* 500 F.2d 86, 91-92 (9th Cir. 1974).

B. Class Action Judgments for Damages Are Not Final Until Individual Damages Are Claimed

From this Court's emphasis that the purpose of class actions is to compensate individuals, and that the differences between class actions and other actions are limited to those procedural variations set forth in Rule 23, it follows that judgments in fully litigated class actions for damages are not final until individual damages have been claimed and proved.

In a non-class civil action for damages, this principle is too plain for argument. The act of filing a complaint in-

volves an individual demand for relief. A complaint is defective if it lacks such a claim. *E.g. RKO-Stanley Warner Theatres, Inc.* v. *Mellon National Bank & Trust Co.,* 436 F.2d 1297, 1304 (3d Cir. 1970). It is not enough for a plaintiff to prove that a defendant has violated the law. Plaintiff must show that *he* has been injured in some amount by that violation. *See Palmer* v. *Connecticut Railway & Lighting Co.,* 311 U.S. 544, 561 (1941); *Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U.S. 555, 562 (1931); *Simon* v. *New Haven Board & Carton Co.,* 516 F.2d 303, 306 (2d Cir. 1975); *Terrell* v. *Household Goods Carriers' Bureau,* 494 F.2d 16, 23-24 (5th Cir.), *petition for cert. dismissed,* 419 U.S. 987 (1974). The burden cannot be shifted to force a defendant to show that a plaintiff was not injured. *Gottesman* v. *General Motors Corp.,* 436 F.2d 1205, 1210 (2d Cir.), *cert. denied,* 403 U.S. 911 (1971).

In class actions, the requirement that individual damages be claimed* is left until the end of the case so that the liability *vel non* of the defendant may be established in the least costly and most efficient way. *In re Antibiotic Antitrust Actions,* 333 F. Supp. 278, 282 (S.D.N.Y. 1971). This requirement, however, has not and could not be eliminated entirely.

Abundant evidence of this need for individual proof of damage exists in the refusal by lower courts to certify class actions when:

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* In the instant case, there is little difference for a class member between a claim of injury and proof of injury. Because damages are so easy to calculate, all a class member need do is show that he owned Boeing's debentures at the appropriate time to establish his damages. The additional complexities of cases in which proof of injury or damages are more difficult need not be discussed here. Because proof of damage is required, however, it follows *a fortiori* that the mere claim of damage necessary in this case is also required.

> "[i]t is readily apparent that no matter how easy it is to establish damages on a class level . . . it is extremely difficult or almost impossible to distribute these sums to their rightful recipients."

City of Philadelphia v. *American Oil Co.*, 53 F.R.D. 45, 72 (D.N.J. 1971). *See Windham* v. *American Brands, Inc.*, 565 F.2d 59, 66, 72 & n.40 (4th Cir. 1977) (*en banc*), *cert. denied*, 435 U.S. 968 (1978); *Kline* v. *Coldwell, Banker & Co.*, 508 F.2d 226, 236 n.8 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) ("It has been suggested that generalized proof of damages might suffice under Rule 23. But the rule does not eliminate the ultimate need for individual proof of damages by each member of the class.") *In re Hotel Telephone Charges*, 500 F.2d 86, 89-90 (9th Cir. 1974); *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005, 1112-14 (2d Cir. 1973) (Medina, *J.*), *vacated and remanded on other grounds*, 417 U.S. 156 (1974); *In re Independent Gasoline Antitrust Litigation*, 79 F.R.D. 552, 561-62 (D. Md. 1978); *Lohse* v. *Dairy Commission*, 25 Fed. R. Serv. 2d 1018, 1020-22 (D. Nev. 1977); *Boshes* v. *General Motors Corp.*, 59 F.R.D. 589, 600 (N.D. Ill. 1973). Some of these decisions have rested on the ground that the fact of injury cannot be tried on a class-wide basis without violating the Rules Enabling Act. *E.g.*, *Windham* v. *American Brands, Inc.*, *supra*, 565 F.2d at 66. Others have held that such abrogations of the requirement of showing individual injury as the concept of "fluid recovery" do not afford defendant due process, *Eisen* v. *Carlisle & Jacquelin*, *supra*, 479 F.2d at 1018.* All have concluded, however, that individual damages must be claimed by individual class members before a defendant's

* While Judge Medina's opinion for the Second Circuit in *Eisen* is not specific as to what due process requires in this situation, we submit that it requires at least that a defendant be shown to owe specific damages to a specific injured person, not to society in the abstract, before judgment can be had against him for that amount.

liability for that amount comes into being, and therefore that a defendant cannot be liable to a class for a "fluid recovery" in which damages are calculated only as a gross amount payable to the class as a whole. *See In re Hotel Telephone Charges*, *supra*, 500 F.2d at 90. Indeed in this very case, and unchallenged either before the *en banc* Court of Appeals or before this Court, is a decision reaffirming the Second Circuit's refusal to allow a "fluid" transfer of unclaimed funds to the class. *Van Gemert II*, Appendix at 51a-52a.

These decisions are unanimous in their recognition that the class action is "a multi-party device on which each class member must step forward to claim his own damages" before those damages will be assessed against a defendant. Gordon, *Manageability Under the Proposed Uniform Class Actions Act*, 31 Sw. L. J. 715, 725 (1977). Final judgment in favor of a particular unnamed plaintiff in a class action, and against a particular defendant, therefore awaits assertion of the plaintiff's claim. Rule 23, to allow the class claim to be asserted without undue expense, has allowed all but this last essential element to be tried without the claimant's participation and without any cost to him, beyond that required to assert his claim. *See Eisen* v. *Carlisle & Jacquelin*, *supra*, 479 F.2d at 1010. Injury must finally be asserted, however, before a class member can recover.

From the fact that there is as yet no final judgment in favor of any non-claiming class member in the instant case, it follows that the common benefit from which plaintiff's attorneys can levy attorneys' fees consists only of the amount so far claimed by the class. Only after the time for filing individual claims has run will the final amount of damages actually involved, and hence the maximum amount of the benefit, be known. *See United States* v. *Imperial Irrigation District*, 595 F.2d 525, 530-31 (9th Cir.

1979). Because unclaimed funds are not part of a common benefit, but are only temporarily in an escrow account pending the approval of claims,* class attorneys cannot be awarded fees from that money under the American Rule on attorneys' fees.

POINT III

This Court's Refusal to Award Fees From Unclaimed Funds Would Protect Meaningful Class Actions While Discouraging Abuses.

It has been shown above that, in the absence of statutes not involved here, class actions for damages have as their proper purpose the compensation of individual injuries. An allowance of fees to class attorneys only from funds claimed by class members cannot discourage class actions brought for this purpose. The instant case, for example, would certainly not have been discouraged, and the over $2,000,000 so far claimed by the class is enough to ensure that no class attorney will be uncompensated. The only kind of action that

* The District Court entered an order requiring Boeing to pay into an escrow account the maximum potential damages of the class, with the claims on that fund being administered by a special master. Appendix at 41a. This order was a procedural device. The District Court did not purport to rule, nor could it have ruled consistent with Rule 23 and due process, that Boeing was liable for that amount. It only calculated, based on its holding concerning the damages attaching to each debenture, the maximum amount for which Boeing might be held liable.

The deposit of money in escrow does not alter the ownership of that money. *See, e.g., Press* v. *Marvalan Industries, Inc.*, 422 F. Supp. 346, 349 (S.D.N.Y. 1976); *see Stanton* v. *Miller*, 58 N.Y. 192, 201 (1874); *Van Tassel* v. *Burger*, 119 App. Div. 509, 511, 104 N.Y.S. 273, 274 (1907); *Alexander* v. *Quality Leather Goods Corp.*, 150 Misc. 577, 579-80, 269 N.Y.S. 499, 502 (Sup. Ct. 1934); 28 Am. Jur.2d Escrow § 10 (1966). Only on the performance of certain conditions—here, the approval of claims—does title to property in escrow change hands. If the conditions are not performed within the time agreed on, the escrow terminates and the property is returned to its owner. 28 Am. Jur.2d Escrow at §§ 10, 17.

will be affected is that in which plaintiffs are not expected to claim any injury. Only a punitive rationale can support such an action, and this rationale is not an appropriate one to support a class action under Rule 23 unless an underlying substantive statute allows it.* It is surely not too much as a policy matter to require plaintiffs to allege and demonstrate that they have been injured before an attorney receives payment for having vindicated their right. The only kind of actions that may be restricted by application of the American Rule on attorneys' fees to class actions will be those in which the attorneys are the principal, if not the only, beneficiaries of the class action judgment.

Further, if attorneys' fees are awarded in this case from the amount actually claimed by debentureholders, maximum incentive will be given to the class attorneys to find their clients, the debentureholders who failed to convert and for whose benefit this action was brought. If class attorneys may rely on being compensated on the basis of a theoretical maximum without regard to actual benefits conferred, they will have little incentive to expend much effort in locating class members. The most vigorous representation of the interests of the entire class could cease just at the time when such representation becomes most important.

It is submitted that the Court of Appeals' *en banc* majority decision in this case will insure the proliferation of class action litigation by compensating attorneys far beyond any benefits in fact conferred by their efforts. The decision will

* Even if a punitive rationale were acceptable for some class actions, for example those in which large numbers of consumer plaintiffs had been cheated by a small amount, such a rationale would not be proper in this case. Boeing was forced to make a choice between the interests of its debt and equity holders which it believed, based on opinions of counsel, accorded with current law, and which it was subsequently told was wrong in an opinion whose soundness has been questioned. *See* Case Note [on *Van Gemert I*], 89 Harv. L. Rev. 1016 (1976).

also insure protraction in these actions by class attorneys even when the class they represent has lost interest in the case. The judgment of the Court of Appeals therefore should be reversed.

CONCLUSION

Both because of the important effect of this decision on class action litigation, and because the decision is contrary to the American Rule on attorneys' fees as set forth in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), petitioners respectfully submit that the judgment of the Court of Appeals (*en banc*) should be reversed.

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